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No.

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In The
Supreme Court of the United States

October Term, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an unregulated, nonprofit electric distribution cooperative is to be treated as a "hybrid" between a municipality and a private entity and therefore as exempt, under this Court's decision in *Town of Hallie v. City of Eau Claire*, from the active-supervision requirement for state-action immunity from the federal antitrust laws.

2. Whether a state can immunize from the reach of the federal antitrust laws a horizontal allocation of territories between two private suppliers of electric power merely by authorizing such a market-division agreement, with no regulation of the rates charged by one of the resulting monopolies.

STATEMENT PURSUANT TO RULE 21.1(b)

The caption of the case in this Court lists all parties to the proceeding in the court of appeals.

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In The
Supreme Court of the United States
October Term, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Eldon Fuchs, *et al.*, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 20, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 1210 and is reproduced in the Appendix, p. A-1. The Opinion Order of the district court is reported at 672 F.Supp. 1111 and is reproduced in the Appendix, p. B-1. Supplemental orders of the district court are unreported and are reproduced in the Appendix, pp. C-1, D-1, E-1.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1988. A petition for rehearing and rehearing *in banc* was denied on November 17, 1988 (Appendix, p. F-1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Illinois Public Utilities Act, Ill.Rev.Stat., Ch. 111 2/3 § 1-101 *et seq.* (1987):

> § 3-104. . . . "Public utility" does not include . . . electric cooperatives as defined in Section 3-119 . . .
>
> § 3-119. "Electric cooperative" is any cooperative which is subject to the Electric Suppliers Act. . .
>
> § 4-101. The [Illinois Commerce] commission shall have general supervision over all public utilities . . .

Illinois Electric Suppliers Act, Ill.Rev.Stat., ch. 111 2/3, § 401 *et seq.* (1987):

> § 403.5. "Electric Supplier" or "Supplier" means an electric cooperative or a public utility which furnishes electric service.
>
> § 406. Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the [Illinois Commerce] Commission.

Sherman Act § 1, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

Petitioners are individual electric customers of a rural electric cooperative, respondent Rural Electric Convenience Cooperative, Inc. ("RECC"). RECC is a party to a contract with a contiguous investor-owned utility, respondent Central Illinois Public Service Company ("CIPS"), under which the parties agreed on mutually exclusive territories for their electric service areas. Petitioners brought this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, charging that the allocation of markets constituted a violation of Sections 1 and 2 of the Sherman Act by the respondent companies, and seeking damages and injunctive relief. (The complaint also sought declaratory and injunctive relief against the Illinois Commerce Commission and named its chairman, respondent Mary E. Bushnell, as a defendant.)

The complaint alleged that petitioners were members of the cooperative as a necessary prerequisite to obtaining electrical service; that CIPS could readily provide electrical service to the petitioners but refuses to do so because of the territorial agreement with RECC; that RECC's rates are substantially higher than those of CIPS; and that but for the market-allocation agreement between the two suppliers of electric power the rates charged by RECC would have been lower as the result of actual or potential competition from CIPS.

An Illinois statute, the Electric Supplier Act, authorizes suppliers of electric power to contract, subject to approval by the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service. Ill.Rev.Stat. Ch. 111-2/3, §406. Such agreements, once approved, control the rights of the respective companies as to what customers they may respectively serve. *Rural Elec. Convenience Coop. v. Ill. Com. Comm'n*, 75 Ill. 2d 142, 387 N.E.2d 670, 672 (1979). The rates of investor-owned utilities are regulated under the Illinois Public Utilities Act. Ill.Rev.Stat. Ch. 111-2/3 §§4-101, 9-101 *et seq.* Electric cooperatives are excluded from the Public Utilities Act. Ill.Rev.Stat. Ch. 111-2/3 §3-104. Their rates are not regulated. (The Illinois Commerce Commission has power to entertain complaints from customers that service

is inadequate and, if it so finds, to order release of the customer to another supplier. The Commission also has power to forbid discrimination among customers. Ill.Rev.Stat. Ch. 111-2/3 §409.) The territorial agreement between the defendant electric suppliers that assigns petitioners exclusively to RECC was entered into February 19, 1969 and received approval from the Illinois Commerce Commission on April 29, 1969.

The district court granted the respondents' motions to dismiss the complaint and for summary judgment, on the basis of the state-action antitrust exemption derived from *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943). The court conceded that in the absence of such immunity the agreement between RECC and CIPS would be a *per se* violation of the antitrust laws. 672 F.Supp. 1111, 1112 (C.D. Ill. 1987). The court also tacitly acknowledged that the Illinois Electric Supplier Act scheme cannot satisfy the "active supervision" prong of the state-action doctrine, as enunciated in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980). The court concluded, however, that electric cooperatives, as not-for-profit corporations, are within the rationale of the "municipality" exemption recognized in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713 (1985), and therefore are not subject to the "active supervision" requirement.

The Court of Appeals affirmed. 858 F.2d 1210. While not expressly adopting the district court's conclusion that an electric cooperative is "analogous to a municipality," the court of appeals reasoned that the principle of the *Town of Hallie* decision should be extended to "hybrid" entities, that is, entities that do not have "the attributes of a purely private actor." The court implicitly accepted petitioners' contention that there can be no adequate supervision of the market division "policy" without price supervision focusing on RECC's rates, and recognized that "a pointed reexamination of market conditions is necessary to constitute active supervision of private parties." 858 F.2d at 1217. It held, however, that RECC's claim of immunity was not to be tested by that standard.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With This Court's Decisions And Seriously Undermines The Settled Requirements For State-Conferred Immunity From The Antitrust Laws By Applying The *Town Of Hallie* Decision To A New "Hybrid" Category Of Nongovernmental Actors.

This Court's decisions have established and enforced a "rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget*, ___U.S.___, 108 S.Ct. 1658, 1662 (1988). First, the challenged restraint must be in accordance with a clearly articulated and affirmatively expressed state policy. Second, the anticompetitive conduct must be "actively supervised" by the State. *Patrick v. Burget, supra; California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721 (1985). The second branch of the requirement is not satisfied by the mere presence of some state involvement or monitoring; state officials must "have and exercise power to review particular anticompetitive acts of private parties." *Patrick v. Burget, supra*, 108 S.Ct. at 1663.

The decision below virtually nullifies the active-supervision requirement with respect to a large and indeterminate class of private actors, *viz.*, those that have "nonprivate" attributes – including, apparently, all cooperative organizations and all nonprofit organizations. Although the court purported to be applying a "less stringent" standard of supervision rather than none at all, the holding makes the active supervision requirement meaningless. The opinion recognizes that there is no state

supervision or regulation of the reasonableness of rates set by rural electric cooperatives in Illinois, the only kind of supervision or regulation that could offset the complete monopoly power insured by the exclusive-territory agreements that electric suppliers are authorized to enter into with one another. *Cf. Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* 471 U.S. at 51, 105 S.Ct. at 1723 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates").

The court of appeals sought to justify its conclusion by reference to this Court's decision in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713 (1985). That decision, however, cannot support the result reached below without a drastic transformation of the state-action immunity doctrine. The distinction drawn in *Town of Hallie* was a distinction between municipalities – i.e. governmental bodies – and private or nongovernmental actors. As the opinion below recognized, the rural electric cooperative involved in this case has none of the characteristics of governmental entities: it is "neither a municipality nor a state agency"; it is not subject to "public scrutiny" or to "the political process". 858 F.2d at 1217.

Although the opinion below professed to find difficulty in drawing the line between public agencies and private entities, the lower court decisions it cited provide no support for extending the *Town of Hallie* decision to nongovernmental bodies. The cases applying *Town of Hallie* have properly treated it as including other kinds of municipal corporations than municipalities, but have not extended it to nongovernmental actors as the opinion below does. Thus the municipal corporation at issue in *Interface Group v. Massachusetts Port Authority,* 816 F.2d 9 (1st Cir. 1987), the Massachusetts Port Authority, was defined by statute to be a "body politic and corporate . . . a public instrumentality." Its seven members

were appointed by the Governor of Massachusetts. Similarly, *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1290 (11th Cir. 1986) involved an airport authority created by the Florida legislature. The members of the authority were appointed by the Governor; it was subject to sunshine laws, had police power jurisdiction, eminent domain power, zoning authority, bonding authority, and rule making power. The ambulance service in *Ambulance Service of Reno, Inc. v. Nevada Ambulance Service, Inc.* 819 F.2d 910 (9th Cir. 1987), was a not-for-profit corporation incorporated by and created pursuant to an intergovernmental cooperation agreement among a county and several municipalities and was owned and controlled entirely by those counties and municipalities. And *cf.*, *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. den.*, 476 U.S. 1170 (1986) (intergovernmental agreement held immune).

Instead of observing the distinction between governmental bodies and private actors, the opinion of the court below purports to graft onto this Court's decisions a new "hybrid" category of actors, actors that are not governmental or municipal in nature but somehow are not "purely" private. Such a category corresponds to no established legal category, appears to be extremely elastic, and if accepted by other courts can only generate confusion and uncertainty concerning the reach of the doctrine of *Parker v. Brown* as developed in this Court's decisions. Moreover, the concept could hardly be accepted without abandoning the "supervision" requirement for major classes of entities heretofore deemed subject to the "rigorous two-pronged requirement" for receiving immunity. Thus, for example, if any category of enterprise could readily be deemed "not purely private" it would seem to be traditional "public utilities," such as common carriers. Yet this Court has specifically recognized the applicability of the "two-prong"

requirement to such enterprises. *Southern Motor Carriers Rate Conference, Inc. v. United States, supra.*

The court of appeals' reliance on the non-profit nature of the electric cooperative to place it in a distinct category under the antitrust laws contradicts both principle and authority. The antitrust laws are not concerned with profit but with efficiency. Consumers are as much injured by a nonprofit monopoly whose inefficiencies are sheltered by agreements in restraint of trade as they are by a similar monopoly that curtails output to realize greater profits. Nor has it been held heretofore that what would otherwise be violations of the Sherman Act are excused because the actors are nonprofit entities; the list of major antitrust decisions involving nonprofit entities is a long one. *E.g., National Collegiate Athletic Association (NCAA) v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948 (1984), to cite but one conspicuous recent example.

Nor is there any basis in authority for regarding cooperatives as different from other private entities fully within the reach of the antitrust laws. Where Congress has desired to give cooperatives special status under the antitrust laws it has done so by specific legislation, as in the case of agricultural cooperatives. There is no such exemption for electric cooperatives. Even where cooperatives have been given special status, that status has been held not to confer immunity on restraints of trade involving concerted action between the cooperative and other producers or entities. *E.g., Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 80 S.Ct. 847 (1960); *Gulf Coast Shrimpers' and Oystermans' Association v. United States*, 236 F.2d 658 (5th Cir. 1956), *cert. den.*, 352 U.S. 927 (1956).

Indeed, as to rural electric cooperatives such as RECC, this Court has specifically indicated that "territorial allocation schemes" between investor-owned utilities and cooperatives constitute *per se* violations of the Sherman Act.

See Otter Tail Power Co. v. United States, 410 U.S. 366, 378-79, 93 S.Ct. 1022, 1030 (1973); *see also Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.*, 263 F.2d 431 (8th Cir. 1959) (territorial agreement between investor-owned utility and electric cooperative held void as illegal restraint of trade).

In the face of such authorities it is especially perplexing that the court of appeals should point to the "membership" aspect of the cooperative as supporting antitrust immunity, a suggestion that entirely overlooks the fact that petitioners and consumers like them are members not by choice but solely because the territorial agreement compels them to be members if they wish to obtain electric service at all.[1]

The decision of the court below is a sharp departure from settled principles concerning state-action immunity from the antitrust laws. It creates new grounds for immunity that have a wide and uncertain field for operation and that would materially undermine the enforcement of the antitrust laws against private activity. The decision in effect allows a state to nullify the antitrust laws merely by declaring a policy of permitting private market-allocation agreements – agreements that are indistinguishable in their economic effects from price-fixing schemes. It runs directly counter to the principle announced in this

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[1] Moreover, it is well known that the "control" such members can exercise is largely fictional. "Given managers' informational advantages, direct control by cooperative members, voting as shareholders at annual meetings, can be expected to be weak in all but the simplest ventures." R. Schmalensee, *The Control of Natural Monopolies* 92 (1979). And *see Arkansas Elec. Co-op v. Arkansas Pub. Serv. Com'n*, 461 U.S. 375, 394, 103 S. Ct. 1905, 1918 (1983): "... [T]here is evidence that even cooperative power utilities may engage in economically inefficient behavior, *see* generally R. Schmalensee, *The Control of Natural Monopolies* 91-93 (1979), and sources cited ..."

Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, supra*, 445 U.S. at 106, 100 S.Ct. at 943:

> The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . "

Certiorari should be granted to clarify the reach of this Court's decision in *Town of Hallie* and prevent the erosion of the active-supervision requirement as a condition for allowing antitrust immunity to private, nongovernmental actors.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2849

ELDON FUCHS, et al.,

On their behalf and on behalf
of all persons similarly situated

Plaintiffs-Appellants,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY and MARY E. BUSHNELL, CHAIRMAN OF THE ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 86-3031—**Richard Mills**, *Judge.*

ARGUED APRIL 20, 1988—DECIDED SEPTEMBER 20, 1988

Before BAUER, *Chief Judge*, COFFEY, and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* Rural Electric Convenience Cooperative ("RECC") signed an agreement with Central Illinois Public Service Company ("CIPS") dividing service areas pursuant to the Illinois Electric Supplier Act. Plaintiff customers, who are member-owners of RECC, contend that defendants violated the antitrust laws by engaging in horizontal market division and monopolization. The

district court granted defendants' motions for summary judgment and to dismiss on the ground that defendants' activities constituted state action exempting[1] them from liability under the antitrust laws. We affirm.

I.

RECC is an unregulated, not-for-profit Illinois corporation, owned by nearly 5,000 consumer-members and governed by an elected board of directors. It is an "electric cooperative" as defined in § 3-119 of the Illinois Public Utilities Act ("PUA"), Ill. Rev. Stat. ch. 111⅔, para. 3-119, and § 3.4(b) of the Illinois Electric Supplier Act ("ESA"), Ill. Rev. Stat. ch. 111⅔, para. 403.4(b). RECC is one of seven local power distribution cooperatives which are members of Western Illinois Power Cooperative ("WIPCO"), a generation and transmission cooperative that provides wholesale power to its members.[2] RECC was formed in

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[1] Although state action is not truly an "exemption" or an "immunity" from the federal antitrust laws, but rather is conduct not subject to those laws, for convenience we use these terms to describe the defendants' status in this case.

[2] WIPCO's "sole function is to supply electricity to its member cooperative systems at wholesale. . . . It is owned by seven electric distribution cooperatives, and its board of directors is comprised of representatives of these corporations." *Western Illinois Power Coop., Inc. v. Property Tax Appeal Board*, 29 Ill. App. 3d 16, 331 N.E.2d 286, 288 (1975). Apparently, in the late 1970's, WIPCO and another cooperative negotiated with the Illinois Power Company to acquire an ownership interest in the new Clinton Nuclear Power Plant. "[T]he REA has urged participation by federated cooperatives [such as WIPCO] in agreements involving the joint ownership and operation of large-scale generation facilities," especially nuclear power plants. *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1360-61 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988). As a part owner of Clinton, WIPCO was responsible for part of the financing of the plant, which experienced substantial cost overruns during construction. Although the record on appeal contains no information about WIPCO's costs and their effect on RECC's rates, the rates WIPCO charges RECC

(Footnote continued on following page)

1936 with a loan from the Rural Electrification Administration ("REA") pursuant to the Rural Electrification Act, 7 U.S.C. §§ 901-916. Congress authorized the REA to provide low interest, federally-insured loans and loan guarantees, preferably to cooperatives and government entities,[3] to facilitate the electrification of rural America. *See generally City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271-72 (8th Cir. 1988); *Salt River Project Agr. Dist. v. Federal Power Comm.*, 391 F.2d 470, 473 (D.C. Cir.), *cert. denied*, 393 U.S. 857 (1968). RECC is not a public utility under Illinois law. PUA § 3-105.c.2.

CIPS is a regulated, investor-owned public utility under § 3-105 of the PUA. Its retail electric rates are regulated by the Illinois Commerce Commission ("ICC"). PUA §§ 4-101, 9-101 *et seq.*[4]

In 1965, Illinois passed the ESA, essentially giving legal sanction to the state's natural electric utility monopolies.[5] The legislature stated that the Act furthered the public interest "to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in

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[2] *continued*

and its other member cooperatives may have risen commensurately with its increased financial obligation to the Clinton project. *See Fuchs*, 672 F. Supp. at 1112 n.2. This may be the root cause of plaintiffs' complaints about their rates. *See infra* note 7.

[3] 7 U.S.C. § 904.

[4] The plaintiffs also brought suit against Mary Bushnell, Chairman of the Illinois Commerce Commission, presumably under the theory that the Commission should not have approved the service area agreement or should have regulated the prices charged by RECC.

[5] "An industry or activity is said to be a natural monopoly if production is most efficiently done by a single firm or entity." R. Schmalensee, *The Control of Natural Monopolies* 3 (1979). *See, id.* at 3-7, 89-99. High fixed costs and economies of scale prevent the survival of competition in the marketplace. *See Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1563 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986).

inconvenience and diminished efficiency in electric service to the public. . . ." ESA § 402. Consequently, the ESA "set forth a comprehensive scheme for determining which of two or more contending suppliers is entitled to serve a given customer or location." *Rural Elec. Convenience Coop. v. Illinois Commerce Comm.*, 75 Ill. 2d 142, 387 N.E.2d 670, 672, 25 Ill. Dec. 794 (1979). Under the Act, both public utilities such as CIPS and electric cooperatives such as RECC are defined as "electric suppliers." ESA § 403.5. The Act effectively froze the status quo of Illinois electric service. It forbid the construction of new lines or the extension of service to customers and areas served by other suppliers except by written consent of the other supplier, subject to the approval of the Illinois Commerce Commission (ICC). ESA §§ 405, 407. To facilitate this scheme, the Act provides that "[a]ny 2 or more electric suppliers may contract together [subject to ICC approval] defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service." ESA § 406.

CIPS and RECC entered into such an agreement on February 19, 1969. The ICC issued its approval on April 29, 1969, finding that the agreement was in the public interest and complied with the ESA. Plaintiffs claim, and the district court found, that this service area agreement is a horizontal market allocation constituting a per se violation of the antitrust laws.[6] They contend that but for

[6] Defendants do not concede a per se violation, contending that the contract must be evaluated under the rule of reason. Because we find that defendants' challenged action was state action not subject to the federal antitrust laws, we do not address the issue of whether the service area agreement on its face violated the antitrust laws. The challenged restraint must be considered an act of the state pursuant to state law, and the ESA is therefore not preempted by the federal antitrust laws. *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 n.8 (1987); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); P. Areeda and H. Hovenkamp *Antitrust Law* (1987 Supp.) ¶ 209.2 (*Parker* and *Rice* mandate essentially the same preemption inquiry).

this agreement, they could buy electricity from CIPS at lower rates than they now pay to RECC.[7] Defendants assert that the federal antitrust laws do not apply to them under the state action doctrine.[8]

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[7] Commissioner Bushnell points out in her brief that even in the absence of the agreement, the ESA freezes service areas. CIPS would need a certificate of public convenience and necessity under PUA § 8-406 in order to extend service to RECC's current customers. Although the primary factor in the issuance of such a certificate is cost savings to customers, PUA § 8-406(d), the existence of a similar service (RECC) in the area might preclude issuance of the certificate.

[8] This dispute is apparently but one variation of the periodic conflicts occurring between co-op customers and their electricity suppliers. When Congress enacted the REA in 1936, ninety percent of rural residents were without electric power. The REA (along with the National Rural Utilities Cooperative Finance Corporation, which provides additional financing to supplement the REA's loan and loan guarantee program) provided the loan capital for the construction of facilities, the extension of lines, and the generation and transmission of power in sparsely populated areas "which the investor-owned utilities had not found it profitable to service." *Salt River*, 391 F.2d at 473. Total cumulative government financing of rural electrification approaches $50 billion. The co-ops pay for these loans through their member/consumers' electric rates. Now that the rural electric systems are almost universally in place, but not paid for, some co-op customers are disgruntled with their rates, which necessarily reflect the amortization cost of the system.

Consequently, distribution co-ops have tried to sell their assets to neighboring investor-owned utilities, *Tri-State Generation and Transmission Assoc., Inc. v. Shoshore River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), or to void their long-term contracts with co-op suppliers whose rates are higher than neighboring utilities. *United States v. Southwestern Electric Coop.*, 663 F. Supp. 538 (S.D. Ill. 1987). The withdrawal of any distribution co-op from the system necessarily shifts the fixed costs of the electricity (represented by the debt service) to the other members of its generation and transmission cooperative and raises the possibility of default, with potentially disastrous results for the system. *See Tri-State*, 805 F.2d at 357. It is clear that somebody will have to retire the debt of the rural electrification system; if co-op customers like plaintiffs succeed in removing themselves from the REA structure in large enough numbers to precipitate default, the costs may eventually

The district court agreed that the state action doctrine precluded plaintiffs' suit against defendants and granted RECC's and Bushnell's motions for summary judgment and CIPS' motion to dismiss. The issue on appeal is whether the court applied the proper test to determine whether defendants' activities are exempt from the antitrust laws.[9] The court held that the ESA articulated a clear and affirmatively expressed policy to displace competition, *see California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *LaSalle Nat'l Bank of Chicago v. DuPage County*, 777 F.2d 377, 381 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986), and that this was sufficient to render the service area agreement immune as state action regardless of whether the state actively supervised the contract or its effects. *Fuchs*, 672 F. Supp. at 1114. Defendants argue that the district court correctly held that active supervision was not necessary, but add that in any event the challenged service area agreement *was* actively supervised by the state. Plaintiffs contend that the court erred in not applying the active supervision test to defendants, and that there is no meaningful active supervision because RECC's rates (as opposed to the service area agreement itself) are completely unsupervised. Applying what we determine to be the appropriate test for state action immunity in this case, we affirm the district court's conclusion that defendants may not be held liable under the antitrust laws for entering into the service area agreement.

II.

The state action immunity doctrine, first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), holds that the Sherman Act does not prohibit official action by, or directed by, the state. *Patrick v. Burget*, 108 S. Ct. 1658, 1662 (1988). The doctrine has undergone substantial development and refinement over the last 45 years. Nonetheless,

[9] By "antitrust laws" we mean the federal antitrust laws referred to in § 1 of the Clayton Act, 15 U.S.C. § 12.

courts have often strained to fit cases into the prescribed analytical mold for determining whether a party's action is entitled to immunity. The Court first fully set forth a structured, two-prong test for state action in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Simply stated, private actors may be held liable under the antitrust laws unless they are acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and that policy is subject to "active supervision" by the state itself. *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 725 (1987). The Court has recently clarified that state and quasi-state actors are subject to less stringent requirements than purely private actors. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In order to identify the proper state action test to be applied to each defendant, we turn for guidance to the reasons behind the state action immunity doctrine, for its rationale must determine its scope. *See Hartigan v. Panhandle Eastern Pipeline Co.*, No. 85-2601, slip. op. at 5 (7th Cir. July 18, 1988) (*en banc*).

A.

The Supreme Court has stressed that the rationale underlying the state action doctrine is the federalist interpretation that the antitrust laws do not apply to actions of the sovereign states themselves. *See* Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 943 (1986). Because Congress never revealed an intent to make the states subject to antitrust limitations, the Court refused to infer this purpose.[10]

[10] Plaintiffs argue that Congress would have explicitly excluded electric cooperatives from the antitrust laws, as it did agricultural (15 U.S.C. § 17; 7 U.S.C. §§ 291-92) and fishery (15 U.S.C. §§ 521-22) cooperatives, had it intended them to be exempt. The crucial question for state action analysis, however, is whether the *state* intends to and does act in its sovereign capacity. The Supreme Court has held that Congress did not attempt to intrude on state regulatory behavior.

Parker, 317 U.S. at 351; *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 & n.9 (1985). In other words, the antitrust laws do not apply to actions of the state which restrain trade, and therefore do not preempt laws authorizing such state action.[11] Thus, state action immunity is not dependent on the wisdom or extent of state regulation, only on whether the state is actually acting to displace free competition. *See* P. Areeda and H. Hovenkamp, *Antitrust Law* (1987 Supp.) ¶ 212.1f (hereinafter "Areeda and Hovenkamp"). A court's analysis under the doctrine therefore focuses on whether it may be sufficiently confident that the state, rather than a private party hiding behind a "gauzy cloak" of state involvement, *Midcal*, 445 U.S. at 105, is the relevant actor.

When the state itself in one of its incarnations performs the challenged activity, it is ipso facto immune from the antitrust laws. Thus, the Supreme Court has held that a state supreme court making decisions on admitting persons to the state bar is immune without further inquiry. *Hoover v. Ronwin*, 466 U.S. 558 (1984). A state's governor's acts are also presumably immune, *see* Lopatka, 46 La. L. Rev. at 1039-40, although the Court has yet to say so. Once it is determined that the action is taken by the state itself, whether or not pursuant to some clear state policy, courts need not engage in any further inquiry—they must dismiss the federal antitrust claim. *See* Areeda and Hovenkamp ¶¶ 212.1c, 212.6.

Municipalities exist under the laws of a state, but are not sovereign in and of themselves. *Hallie*, 471 U.S. at 38. The Court has therefore held that to be immune from the antitrust laws[12] municipalities must be acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *Midcal*, 445 U.S. at 105. The state policy need not compel the municipality to take

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[11] *See supra* note 6.

[12] The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, immunized municipalities from antitrust damages liability.

the challenged action; it is enough that anticompetitive effects are reasonably foreseeable consequences of the state's grant of authority. *Hallie*, 471 U.S. at 42. Nothing more is required to ensure confidence that the acts of a municipality should be shielded as acts of the state, because a municipality lacks the attributes and incentives of private actors, and does not pose the danger of private price-fixing that the antitrust laws were intended to prevent.

State agencies, although not tantamount to the state itself, are instrumentalities of the state which are necessary to implement state policies. The Supreme Court has declined to hold whether agencies must be actively supervised by the state, although it has noted that such a requirement is unlikely. *Id.* at 46 n.10. Perhaps because it is "not easy to imagine just how a state in practice would go about supervising its agencies," Lopatka, 46 La. L. Rev. at 1040-41, lower courts have held that such agencies are beyond the reach of federal antitrust restrictions as long as their anti-competitive activities were reasonably foreseeable. *See Wicker v. Union County Hosp.*, 673 F. Supp. 177, 186 (N.D. Miss. 1987) (hospital was government agency immune if acting pursuant to clearly articulated state policy); *Humana of Illinois, Inc. v. Board of Trustees of Southern Illinois Univ.*, 1986-1 Trade Cas. (CCH) ¶ 67,127 (C.D. Ill. 1986) (state university was state agency requiring only clear articulation prong); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1383 (N.D. Ga. 1986), *aff'd on other grounds*, 844 F.2d 1538 (11th Cir. 1988) (electric authority composed of 46 Georgia municipalities and one county was state agency immune without regard to state supervision).

The state may, and often must, also turn to private actors to effect its policies. While the state itself is immune from any actions or agreements which would violate the antitrust laws, its purposes would be thwarted if the instrumentalities chosen to implement its policies could be held liable. *Patrick*, 108 S. Ct. at 1662.

> If *Parker* immunity were limited to the actions of public officials . . . a state would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan.

Southern Motor Carriers, 471 U.S. at 56-57. *See also Cine 42nd Street Theater v. Nederlander Org.*, 609 F. Supp. 113, 119 (S.D.N.Y. 1985), *aff'd* 790 F.2d 1032 (2d Cir 1986). The Supreme Court has therefore found that private parties may be immune, but only if they meet a more stringent two-part test. This test is designed to determine whether a private party is acting as an instrument of the state, or whether that individual or entity is hiding behind a "gauzy cloak" of state involvement to pursue anticompetitive private interests antithetical to the antitrust laws. *Midcal*, 445 U.S. at 106. Not only must private parties show that the state clearly authorized their conduct, but also that the state actively supervised the allegedly anticompetitive policy. Without such supervision, the Supreme Court has determined, courts cannot be confident that private parties are carrying out the avowed policy of the state rather than abusing the state grant of authority to pursue their own ends. The active supervision requirement "serves essentially an evidentiary function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). It provides a "realistic assurance that a private party's anticompetitive conduct promotes state policy." *Patrick*, 108 S. Ct. at 1663. *Cf.* Lopatka, 46 La. L. Rev. at 1002-03 (arguing that there is no strong justification for an active supervision requirement); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federation*, 75 Calif. L. Rev. 227, 249-50 (1987) (arguing that an active supervision requirement promotes the federalist value of citizen participation in government).

In the present case, the district court held that under the rationale for state action immunity clarified in *Hallie*, defendants were shielded from liability without regard to

active supervision by the state. In *Town of Hallie*, four unincorporated townships sued the adjacent city of Eau Claire for acquiring a monopoly over sewage treatment services and for tying such services to sewage collection and transportation. The Court found that a Wisconsin statute authorizing a city to "fix the limits" of its public services in unincorporated areas and providing that "the municipal utility shall have no obligation to serve beyond the area so delineated" constituted a clearly articulated state policy to displace competition. The Court then considered whether active supervision was needed to render the conduct immune as state action. The Court reasoned that the supervision requirement served the evidentiary function "of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* at 46. Because private parties engaging in anticompetitive activity are likely to be acting in their own interest, the Court imposed the supervision requirement "to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies." *Patrick*, 108 S. Ct. at 1663. In other words, it "is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the . . . state policy at stake." *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985). The *Hallie* Court held that there was "little or no danger" that a city such as Eau Claire was "involved in a *private* price-fixing arrangement." *Hallie*, 471 U.S. at 47 (emphasis in original). Eau Claire was therefore immune from antitrust attack despite the lack of state supervision over the city's sewage services.

B.

There is no question that RECC and CIPS entered into, and the ICC approved, the service area agreement pursuant to "a clearly articulated and affirmatively expressed

policy to displace competition." As the district court stated, one could hardly envision a statutory scheme that evinces a clearer, more affirmative intent. *Fuchs*, 672 F. Supp. at 1113. The problem in this case is to determine whether, or to what extent, the defendants are subject to both the clear articulation and active supervision prongs of the state action immunity test.

In antitrust cases, courts have often found it difficult to determine whether actors should be treated as public agencies or private entities. The dividing line is neither sharply drawn nor easily perceived. *See* Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (1982). In *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987), a charter airline operator charged the port authority with unreasonable exclusive dealing because it allowed only certain ground services companies to operate out of the terminal that the charter's airplanes were required to use. The court held Massport immune under the state action doctrine because it was authorized by the legislature to set policies on who would use or service which terminal, irrespective of whether the port authority's actions pursuant to the policy were supervised by the state. "Even if Massport is not the state itself, it at least is equivalent to a municipality. The Supreme Judicial Court [of Massachusetts] has explicitly recognized that Massport resembles a municipal corporation and that Massport 'is in no sense a private or business corporation.' " *Id.* at 13 (citation omitted). The court noted that Massport possessed attributes of a governmental entity, including "the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status." *Id.*

Similarly, in *Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv.*, 819 F.2d 910 (9th Cir. 1987), a private ambulance services corporation sued defendant REMSA (a charitable Nevada corporation formed at the direction of the county board of health) and the county board for granting REMSA an exclusive franchise of emergency medical services. The Ninth Circuit found that the Nevada

legislature expressly authorized the granting of an exclusive franchise to REMSA. In ruling that active supervision by the state was not a necessary precondition to state action immunity, the court wrote that REMSA could not be neatly characterized as either a private entity or the mere instrument of the board of health. "REMSA is not a private non-governmental entity that can be expected to pursue its own economic interests to the prejudice of the public . . . [but] it is neither a city, a county, nor the . . . Board of Health. Its interests are not precisely the same as theirs. REMSA falls somewhere between. . . ." *Id.* at 913. The court concluded that REMSA was "much closer" to the municipality in *Hallie* than the private actors in *324 Liquor. See also Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1290 (11th Cir. 1986) (county aviation authority "analogous to a municipality" and therefore immune from antitrust attack, without regard to active supervision requirement, where legislature authorized the granting of an exclusive limousine operator's license to and from airport).

We therefore focus on defendants' attributes to determine whether they are the state, a state agency, or an "arm of the state" which may be presumed to act in the public interest, *see Hallie*, 471 U.S. at 45, or whether, like private parties, they might seek to further their own interests at the expense of state goals. Defendant Bushnell is being sued in her official capacity as Chairman of the ICC, an Illinois state agency, PUA § 2-101 *et seq.*, which approved the service area agreement pursuant to a clear state policy. ESA § 406. She is therefore immune from liability as a state actor.

Defendant RECC does not fit easily into any clear category on the continuum from private to public. *See* Areeda and Hovenkamp, ¶ 212.6 (noting "pervasive vexatiousness of this question"). It is neither a state agency, a municipality, nor a purely private actor. Plaintiffs charge RECC with horizontal market allocation and monopolization, and contend that there can be no adequate supervision of the

market division "policy" without price supervision focusing on RECC's rates. We recognize that a pointed re-examination of market conditions is necessary to constitute active supervision of private parties. We hold that RECC should not, however, be subject to such a stringent standard.

The district court found RECC analogous to a municipality and therefore held that active supervision was not required under *Hallie*. We agree with the district court that RECC cannot be characterized as a purely private actor. Unlike private actors who seek to further their own interests and will exploit market factors to reap the highest possible profits, rural electric cooperatives are in some sense "instrumentalities of the United States." *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672, 677 (5th Cir.), *cert. denied*, 393 U.S. 1000 (1968). *See Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571-72 (5th Cir. 1984) (Higginbotham, J., concurring specially), *cert. denied*, 473 U.S. 1053 (1986). RECC is a not-for-profit corporation which charges no more than necessary to cover the cost of electricity from WIPCO plus debt service and expenses. *Fuchs*, 672 F. Supp. at 1114. Its by-laws dictate that all excess amounts must be refunded to member/owner/customers. *Id.* RECC's only purpose is to provide power to its members as cheaply as possible consistent with the requirements of its REA financing. Moreover, if it pursues its own "interests" (whatever these might be) to the detriment of its owners, antitrust law seems an odd vehicle for relief. All of the shareholders of a corporation do not typically come together to sue their corporation for harm it does to them; rather than sue themselves, they act together to form new management and set new policies. As the district court noted, grievances of this type are best resolved in the board room or "through the legislature, not in litigation." *Fuchs*, 672 F. Supp. at 1116.

We do not believe, in light of RECC's non-private attributes, that it should be subject to the same state action analysis applicable to a purely private party. However, it is neither a municipality nor a state agency. Although

RECC has the power of eminent domain (ESA § 413), it is not a body politic like a municipal corporation and is not subject to public scrutiny through sunshine laws or the political process. *See Hallie*, 471 U.S. at 45 n.9. It is a hybrid entity with sufficient non-private attributes that its activities require some lower level of supervision to ensure that it is acting pursuant to state policy. *See* Areeda and Hovenkamp ¶ 212.9f.

We hold that when an entity charged with an antitrust violation is neither a municipality nor a state agency but does not have the attributes of a purely private actor, it may be held immune as a state actor without the active scrutiny of market conditions which is a necessary prerequisite for holding a private entity immune. Under the ESA, the ICC approves the agreement, resolves all disputes under it, and has the power to enforce compliance with its rulings. ESA §§ 407-416. In light of RECC's attributes, the scheme providing ICC supervision of the service area agreement constitutes adequate assurance that RECC is acting to implement state policy. RECC is therefore immune from antitrust liability as a state actor.

Defendant CIPS is a private entity charged, like RECC, with entering into an agreement to divide markets and a "refusal to deal" on the basis of that agreement. There is no allegation that CIPS' rates are unsupervised or excessive (indeed they are claimed to be preferable to RECC's rates). CIPS is a public utility subject to the full panoply of ICC regulation. It acted pursuant to clear state policy, and its alleged anticompetitive conduct—the agreement—is actively supervised by the ICC. To the extent that the inquiry into CIPS' immunity must focus on the prices charged by RECC, we have already held that RECC is not involved in the kind of private price fixing forbidden by the antitrust laws. Therefore, CIPS may not be held liable for such price fixing. Further, it would be anomalous to hold CIPS alone liable for rates charged by an unregulated electric supplier on the basis of an agreement largely mandated by and supervised by the state. As to CIPS, therefore, the challenged restraint is clearly articulated

and the "policy" actively supervised within the meaning of *Midcal*.

The decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ELDON FUCHS, et al.,
Plaintiffs,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., et al.,
Defendants.

No. 86-3031

FILED

OCT 30 1987

JOHN M. WATERS, CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

OPINION ORDER

MILLS, District Judge:

Is the Illinois Electric Supplier Act unconstitutional?

Does the power service agreement thereunder violate the Sherman Antitrust Act?

No–to both inquiries.

This action is before the Court on Rural Electric Convenience Cooperative's motion for summary judgment and Central Illinois Public Service Company's motion to dismiss under Fed. R. Civ. P. 56 & 12(b) (6) respectively. The pertinent facts are not disputed, and these motions are consolidated for purposes of ruling.

I

Central Illinois Public Service Company (CIPS) is a public utility regulated by the Illinois Commerce Commission (ICC). Rural Electric Convenience Cooperative (RECC) is an unregulated, not-for-profit corporation engaged in the retail distribution of electrical power to its

members.[1] Plaintiffs are member-owners and customers of RECC.

In 1969, CIPS and RECC, pursuant to the Illinois Electric Supplier Act, Ill. Rev. Stat. ch. 111 2/3, ¶406, entered into an agreement which divided up service areas. In compliance with the act, the ICC reviewed and approved the contract. RECC now exclusively services the area where Plaintiffs live at electric rates higher than those charged by CIPS.[2] Because of the contract, CIPS refuses to ser-

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[1] In 1936, Congress passed the Rural Electrification Act, 7 U.S.C. §901-950, and authorized the Rural Electrification Administration to make loans to electrify rural America. Investor-owned utilities, however, did not take the initiative in extending electric service to most rural areas. As a result of the need for rural electrification in Illinois, RECC, among other cooperatives, was formed in 1936, obtained a $260,000 REA loan, and, in 1937, energized its initial 134 miles of distribution lines serving 395 member-owners. RECC now serves over 4,800 member-owners with 1,200 miles of distribution lines.

[2] RECC is a member cooperative of Western Illinois Power Cooperative (WIPCO). WIPCO is a generation and transmission cooperative which has the responsibility for providing wholesale power to RECC and six other rural electric cooperative associations. In the late 1970s, WIPCO and Soyland Power Cooperative (a generation and transmission cooperative serving 15 rural electric cooperatives) negotiated with the Illinois Power Company to participate in the ownership of the Clinton Nuclear Plant to assure a stable supply of power and energy to their members at reasonable rates. WIPCO now owns 9.5% of the Clinton plant and is thereby obligated to partially finance it. Since construction began on the plant, interest rates have risen sharply and the Three Mile Island disaster prompted new federal regulations which changed construction and engineering plans already in progress. These factors greatly increased the cost of completion, thereby raising WIPCO's financial obligation. The plant was originally scheduled for completion at a cost of $430 million; however, that figure has risen to at least $4.25 billion. Although WIPCO has put a cap of $450 million on the Clinton investment, its involvement in this project has caused rates to be higher than they otherwise would have been.

vice RECC customers. Due to that refusal, Plaintiffs not only seek damages and an injunction against the retailers invalidating the contract under §§1 and 2 of the Sherman Act but also a declaration that the Electric Supplier Act is unconstitutional as violative of the Supremacy Clause.

II

Undoubtedly, the horizontal market allocation in which the suppliers have engaged is a *per se* violation of applicable federal antitrust laws. *See Gainesville Utilities Dept. v. Florida Power & Light Co.*, 573 F.2d 292, 299 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). The ultimate issue then is whether the Sherman Act applies to the service area agreement between RECC and CIPS. Defendants assert that the agreement is immune from antitrust scrutiny under the state action doctrine enunciated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).[3] Plaintiffs contend otherwise.

In *Parker*, a California raisin producer challenged the state's Agricultural Prorate Act under which a cartel of private raisin producers was created to stabilize prices and prevent economic waste. The Court, relying on principles of federalism and state sovereignty "refused to construe the Sherman Act as applying to the anti-competitive conduct of a State acting through its legislature. . . . Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade, and it refused to infer an intent to 'nullify a state's control over its officers and agents' in activities directed by the legislature." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). Thus, the

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[3] As we find review under *Parker* to be proper course, analysis under *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), is necessarily inapplicable. In *Rice*, the Court addressed the question of when a state law would be preempted by federal antitrust law.

state action doctrine arose as an exception to antitrust law.[4]

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 413 (1978), a suit involving a municipally run electric utility system, the Court enunciated what has become known as the two-prong test of the state action doctrine. Thereafter, in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court applied the *Lafayette* test to a case where the state action exemption was claimed by a private party. In *Midcal*, the plaintiff challenged California's resale price maintenance and price posting statutes for the wholesale wine trade. The Court, quoting from *Lafayette*, stated that for the state action doctrine to apply, the challenged restraint (1) must be one clearly articulated and affirmatively expressed as state policy, and (2) must be actively supervised by the state. *Id.* at 105.

In *LaSalle Nat'l Bank of Chicago v. DuPage County*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2892 (1986), the Seventh Circuit stated of the test's first prong: "[T]he state need not specifically authorize conduct with anti-competitive effects. . . . It is sufficient that anti-competitive effects are a foreseeable consequence of engaging in the authorized activity." *Id.* at 381. Although *LaSalle* involved suit against a local government, its principles with respect to the first prong of the test are fully applicable here. *Cf. Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1984) (extending *Parker* rationale to suits against private parties).

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[4] "Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1984).

A. State Policy

In the instant case, the challenged restraint is the Illinois Electric Supplier Act. The legislature expressly declared its purpose as follows:

> The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electrical service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service.

Ill. Rev. Stat. ch. 111 2/3, ¶402 (1985). To further this intent, the legislature stated: "Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the Commission." *Id.* ¶406.

The above section sufficiently illustrate a "clearly articulated and affirmatively expressed" state policy to displace competition. But the legislature did not stop there. In ¶407 of the Act, the legislature prohibited, except under certain enumerated conditions, electric suppliers from making extensions of existing lines or constructing new lines for the purpose of serving new customers not yet covered by an area allocating agreement as set out in ¶406. Further, ¶408 provides for a hearing before the Illinois Commerce Commission between competing suppliers in which the Commission is to choose one, and only one, supplier to service a particular area.

One can hardly envision a statutory scheme which more clearly articulates and affirmatively expresses a state policy to displace competition. Electric utilities are generally acknowledged as a natural monopoly. *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1563 (5th

Cir. 1984). What the Illinois legislature did in the Electric Supplier Act was to codify this notion. To require more of the General Assembly, this Court would have to hold that the "legislature must expressly state in a statute or its legislative history that it intends for the delegated action to have anti-competitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written." *Town of Hallie*, 471 U.S. at 43.

Thus, the Court finds that the challenged restraint is a clearly articulated and affirmatively expressed state policy to displace competition and therefore satisfies the first prong of the *Lafayette-Midcal* test.

B. Active Supervision

As mentioned, the second prong of the *Lafayette-Midcal* test for state action doctrine immunity requires the state's active supervision of the affirmatively expressed state policy. In certain situations, however, this prong need not be satisfied for the state action doctrine to apply. In *Town of Hallie*, four unincorporated townships brought suit against the City of Eau Claire contending that the city violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services and by tying the provision of such services to the provision of sewage collection and transportation services. The Supreme Court held that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.* at 46. The Court so held for the following reasons:

> [T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of insuring that the actor is engaging in the challenged conduct pursuant to state policy. In *Midcal*, we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvment over what is essentially a private price-fixing arrangement." 445 U.S. at 106. Where a private

> party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy.

Id. at 46-47.

Similarly, the instant case involves a not-for-profit utility owned by Plaintiffs. This is not a private, for-profit venture which is seeking to further its own interests. Like the situation involving a municipality, absolutely no danger of a private price-fixing agreement exists. The cooperative merely sets rates according to the cost of the energy plus debt service and operating expenses actually incurred. Further, through credits paid to a capital account, each patron is refunded amounts paid "in excess of operating costs and expenses." *Rural Electric Convenience Cooperative By-Laws*, art. VII, §2.[5] Thus, lack of a profit motive coupled with the fact that the cooperative is owned by the very people challenging its unregulated existence, leads to the conclusion that the cooperative does not run afoul of the Sherman Act.

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[5] Plaintiffs' argument that the credits to the capital account are not paid back to the owner-members for many years after they are earned is of no moment since the decision to disburse such funds lies with the Board of Directors–which, of course, serves at the whim of the member-owners. Further, the member-owners are free to structure and amend their by-laws as they see fit.

Judge Higginbotham, of the Fifth Circuit, has stated:

> In our economic system, private business enterprises are presumed to respond predominantly, if not exclusively, to the profit motive. By contrast, the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law–the private desire to reap extra-normal profits versus the public interest in free competition–will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1571-72 (5th Cir. 1984) (Higginbotham, J., concurring specially), *cert. denied*, 474 U.S. 1053 (1986). The same argument could be made by simply substituting "not-for-profit electric utility" for "unit of government" and "governmental entity."

In support of this view, the Court of Appeals for the District of Columbia Circuit has stated that, although not-for-profit electric cooperatives enjoy a free hand in rate making,

> by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

Salt River Project Agricultural Improvement & Power Dist. v. Federal Power Comm'n, 391 F.2d 470, 473 (D.C. Cir. 1968) (footnote omitted), *cert. denied*, 393 U.S. 857

(1968).[6] This view fully supports the extension of the *Town of Hallie* rationale to cover electric cooperatives. Where there is no danger of private price fixing agreements (and thus no transgression of the Sherman Act), there is no need for active state supervision.

Further support is found in *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987). There, the Massachusetts Port Authority (Massport) was created by the Massachusetts legislature to operate Logan Airport. In holding Massport immune from antitrust scrutiny, the First Circuit determined that Massport "resembles a municipal corporation." Therefore, it needed only to show that it acted pursuant to clearly articulated states policy and not that it was actively supervised by the state under the supreme Court's decision in *Town of Hallie*. The Court based its decision, in part, on findings by the Supreme Judicial Court of Massachusetts that Massport was "in no sense a private or business corporation" and "[o]nly the public is to be benefited" by its existence. *Id.* at 13; *see also Interface Group, Inc. v. Massachusetts Port*

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[6] Plaintiffs point to *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n* 461 U.S. 375, 394 (1983), wherein the Court stated that "there is evidence that even cooperative power utilities *may* engage in economically inefficient behavior." *Id.* at 394 (citing R. Schmalensee, The Control of Natural Monopolies (1979)) (emphasis added). A close reading of Schmalensee's work indicates that to say cooperatives *may* engage in inefficient economic behavior is tantamount to saying that the world *may* end tomorrow–yes, it could happen, but we do not have any empirical data on it yet. Schmalensee flatly states: "Experience with cooperative ownership structures in natural monopoly sectors is not extensive." *Id.* at 89. He further states: "Very little empirical work has been done on cooperatives. In particular, the politics and economies of rural electric and telephone cooperatives have been little studied. . . ." *Id.* at 91. However, even granting the proposition that cooperatives *may* engage in economically inefficient behavior in no way suggests that they engage in private price fixing agreements.

Auth., 631 F. Supp. 483 (D. Mass. 1986) (quoting *Opinion of the Justices*, 334 Mass. 721, 734 (1956)).

The not-for-profit electric cooperative in the case at bar is likewise analogous to a municipality for antitrust purposes. As the Supreme Court stated in *Town of Hallie*, "there is little or no danger that it is involved in a *private* price fixing agreement." *Town of Hallie*, 471 U.S. at 47. This statement would seem to have even more applicability where, as here, the consumers to be protected against such private agreements are the owners of the corporation involved. To say that state supervision is necessary in this situation is to say that the member-owners need the state to tell them not to make a private price fixing agreement against themselves. Such a holding would do violence to reason and common sense.

III

Clearly, the impetus for Plaintiffs' suit against RECC is the relatively high electric rates its member-owners must pay. Just as clear, however, is the fact that these high rates are not the result of price fixing–the evil against which the Sherman Act protects. It is not the Court's nor the Sherman Act's concern if the cooperative's prices are relatively high. Keeping prices down is a problem to be solved by the member-owners as best they can at board meetings and the like or through the legislature, not in litigation.

Thus, the Court determines that, having passed the first prong of the *Lafayette-Midcal* test, RECC and CIPS are entitled to exemption from the federal antitrust laws under the state action doctrine.

Finding no transgression of the Sherman Act (and therefore none of the supremacy clause), the Court finds no merit in Plaintiffs' argument that the Electric Supplier Act is unconstitutional.

Ergo, for the reasons given above, Defendant Central Illinois Public Service Company's motion to dismiss is ALLOWED and Defendant Rural Electric Convenience Cooperative's motion for summary judgment is also ALLOWED. Consequently, Plaintiffs' motion to certify as a class is DENIED as moot.

ENTER: 29 October, 1987.

FOR THE COURT:

/s/ RICHARD MILLS

RICHARD MILLS
United States District Judge

APPENDIX C

In The United States District Court
Central District of Illinois
Sringfield Division

ELDON FUCHS, et al.,
Plaintiffs,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., et al.,
Defendants.

No. 86-3031

FILED

NOV 2 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

ORDER

MILLS, District Judge:

This action is before the Court on Plaintiffs' motion for summary judgment pursuant to Fed. R. Civ. p. 56. Defendants have previously filed a motion for summary judgment and motion to dismiss, respectively, which are addressed simultaneously in a separate opinion order (referred to herein as "previous order").

The Court addresses this motion with some hesitation as it was previously Plaintiffs' position (in their reply to Defendant's motion for summary judgment) that this cause is not disposable on summary judgment motion because there are disputed issues as to material facts. This inconsistency is Plaintiffs' positions notwithstanding we will briefly address the merits of the present motion.[1]

[1] The Court addresses this motion without the benefit of Defendants' reply memoranda which, in light of our disposition, are unnecessary.

In their memorandum, Plaintiffs make no new arguments with respect to the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), which is at the heart of this dispute. They state the issues as follows: "(1) is it the policy of Illinois to restrain trade by the creation of unregulated electric supply territorial monopolies and, if so, (2) does the State of Illinois actively supervise the anticompetitive effects of that policy."

Initially, Plaintiffs refer to the first prong of the state action test under which the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Plaintiffs argue that "there simply is no articulated state policy of unregulated monopoly control of the sale of power to consumers. The statute is entirely silent as to that phenomenon." This contention is quickly answered by the Supreme Court's pronouncement in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), that a legislature need not "expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and how statutes are written." *Id.* at 43.

Under Plaintiffs' second stated issue, they refer to the second prong of the state action test, that the challenged restraint must be actively supervised by the state. This subject is addressed exhaustively in our previous order where we held that, in light of the Supreme Court's decision in *Town of Hallie*, no state supervision is necessary under the facts presented here.

In conclusion, we note that in Plaintiffs' argument that there is insufficient state supervision to satisfy the state action test, Plaintiffs list a number of areas which are unregulated: changes in electric rates, a requirement of just and reasonable charges, new plant construction, reasonableness of capacity to generate power, amount of

money spent on political activities, and amount of money spent on advertising. Plaintiffs further state that no regulatory agency oversees performance and efficiency of the cooperative or has the power to command the cooperative to produce its books or even examine the books. Finally, Plaintiffs argue, even the accuracy of the cooperative's meters are not checked.

The Plaintiffs bemoan the absence of regulation in these areas; however, they neglect the fact that oversight in all of the above areas is within the purview of each Plaintiff as a member-owner of the cooperative. To bring in the state to regulate these matters would be a waste of the state's resources and unnecessary in light of the cooperative's not-for-profit status. The Illinois legislature has made this determination and we are not at liberty to tinker with it.

Ergo, for all the reasons given above and those stated in our previous order, Plaintiffs' motion for summary judgment is DENIED.

CASE CLOSED.

ENTER: 30 October, 1987.

FOR THE COURT:

/s/ RICHARD MILLS
RICHARD MILLS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ELDON FUCHS, et al.,
Plaintiffs,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., et al.,
Defendants.

No. 86-3031

FILED

NOV 09 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

ORDER

MILLS, District Judge:

This matter is before the Court on Defendant Mary Bushnell's motion for summary judgment. Defendant was named in the complaint in her capacity as Chairman of the Illinois Commerce Commission.

Pursuant to Fed. R. Civ. P. 56, summary judgment may be granted where no genuine issue as to any material fact exists. That is the case here.

By opinion order of October 29, 1987, this Court allowed motions by the other named Defendants to dismiss this cause. As the issues between Plaintiffs and this Defendant are identical to those addressed in the opinion order previously rendered, it is wholly dispositive as to this motion.

Ergo, for the reason given above, Defendant Mary Bushnell's motion for summary judgment is ALLOWED.

CASE CLOSED.

ENTER: 6 Nov., 1987.

FOR THE COURT:

/s/ RICHARD MILLS
RICHARD MILLS
United States District Judge

APPENDIX E

United States District Court

CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DE GROOT, ROBERT A. DIXON, KENNETH E. HAUBOLD, PAUL A. HENDRICKS and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated.

vs.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE CO., and MARY E. BUSHNELL, CHAIRMAN OF THE ILLINOIS COMMERCE COMMISSION, an agency of the State of IL.

No. 86-3031

FILED

NOV 2 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILINOIS

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to orders entered by the Honorable Richard Mills, Defendant Central Illinois Public Service Company's motion to dismiss is allowed and Defendant Rural Electric Convenience Cooperative's motion for summary judgment is also allowed. Plaintiffs' motion for summary judgment is denied.

11/9/87
AMENDMENT
Pursuant to Order entered by The Honorable Richard Mills, Deft Mary Bushnell's motion for summary judgment is allowed.

JOHN M. WATERS
UNITED STATES DISTRICT CLERK

/s/ GLORIA UTSINGER
Deputy Clerk

FILED

NOV 09 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILINOIS

November 2, 1987
Date

/s/ JOHN M. WATERS
Clerk

/s/ CHRISTY TAYLOR
(By) Deputy Clerk

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 17, 1988

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

ELDON FUCHS, et al., On their behalf and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

No. 87-2849 *vs.*

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY and MARY E. BUSHNELL, CHAIRMAN OF THE ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 86-3031

Richard Mills, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.